Supreme Court, U.S.
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No. 87-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GARDNER L. CRISP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether the government and court's use at sentencing, both directly and indirectly, of defendant's incriminating statements made in the course of his fulfilling his part of a plea agreement violated that plea agreement's grant of use immunity under 18 U.S.C. §6002.

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1987

No. _____

GARDNER I. CRISP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION BELOW

The opinion of the court of appeals (App. 3a-15a, infra),[1] is reported at 817

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[1] "App." refers to the Appendix that follows this Petition. "J.A." cites refer to the Joint Appendix prepared by counsel below in accordance with Rule 10, Fed. R. App. Pro. and the Fourth Circuit Rules.

F.2d 256. The opinion of the district court is not officially reported. (App. 16a-29a, infra).

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1987. The court of appeals denied a timely petition for rehearing on June 30, 1987 (App. 1a-2a, infra). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Title 18, Section 6002:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to-
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee or a subcommittee of either House,
>
> and the person presiding over the

> proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT

On November 20, 1985, petitioner Gardner Crisp and nine other individuals were indicted by a grand jury in the Eastern District of Virginia, and charged with various cocaine related offenses and tax charges. On December 17, 1985, a superceding indictment was filed in this case and trial was scheduled for January 21, 1986.

On January 17, 1986, petitioner entered into an agreement with the United

States wherein he agreed to plead guilty to a conspiracy to possess and distribute cocaine, and to tax evasion. Crisp also agreed to forfeit certain property and to immediately cooperate fully with the United States so that his testimony could be utilized in the upcoming trial of his co-defendants and for other prosecutions.[2] In exchange for this, the United States agreed to dismiss the remaining charges against Crisp and to treat Crisp's statements to the United States as having been obtained under a grant of immunity pursuant to 18 U.S.C. §6002.

After reaching this accord, and with the final version of the written plea

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[2] To arrange for the government's immediate debriefing of Crisp, the AUSA joined in defense counsel's Motion for Bond. The District Court granted said Motion, thereby terminating Crisp's two-month pretrial detention.

agreement literally still in the word processor, the two parties contacted Judge Calvitt Clarke and asked the court to entertain the plea. The court was amendable, but cautioned the parties that the hearing had to be completed rapidly since he would not cause his staff to be late to a retirement banquet for retiring Judge MacKenzie that was scheduled for later that evening. (J.A. 112-113).[3] Because of the importance to the parties that the plea be entered immediately, the plea hearing began without an executed copy of the agreement before the court, or the parties. (J.A. 112). Instead the plea agreement was orally explained:

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[3] The Court explained that if the plea was not entered then and there, then it would have to be entered on the morning of the scheduled trial, an alternative not acceptable to the United States since the law enforcement officials wished to debrief Crisp during the intervening days.

AUSA BRADENHAM:

> ... The essence of the plea agreement, Your Honor, is that Mr. Crisp will plead guilty to count one, which is the conspiracy count and also plead guilty to count thirty-five, which is the income tax evasion as charged with Mr. Crisp.
>
> He'll fully cooperate and testify against co-conspirators or any other individuals involved with this particular enterprise.
>
> Futhermore, Your Honor, he will forfeit the sum of $30,000.00, which represents the equity in a residence that is located at 116 Wendfield Circle that is described in more detail in count 27 on the forfeiture count, and that he will also agree to forfeit to the United States a 1982 Mercedes automobile... (J.A. 113-114).

The court then made the required inquiries of the parties, including the following pertinent colloquy:

THE COURT: ... and has any representations been made to the defendant, other than what is included in the plea agreement to entice him to plead guilty?

MR. MARK: No, your Honor, only our understanding with the government that their debriefings are treated as §6002 U.S.C. immunity debriefings.

THE COURT: Only what?

MR. MARK: When they debrief someone, they - they treat the information as if it was 6002 material. We understand that's not in the agreement, but it's the policy of the office, that's all.

THE COURT: What's 6002?

MR. MARK: Immunity

THE COURT: Alright.

MR. MARK: Gives him use immunity for-- for use against him.

THE COURT: All right. Well, that ought to be in the plea agreement. Is it? It generally is, in your letter of your plea agreement.[4]

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[4] The Court later acknowledged that it was defense counsel's understanding that this immunity agreement was "in addition to what is in the written agreement, that the government has agreed that it will not use any information that

MR. BRADENHAM: Judge, we-- we took out a paragraph in there that says that it could be used against him . . . (emphasis added).

(J.A. 116). The court and AUSA Bradenham then had a discussion regarding whether this agreement would permit petitioner's statements to be used against him in the event Mr. Crisp did not fulfill his obligations under the agreement. In response to the court's inquiry, AUSA Bradenham told the court that the statements would not be admissible even if Mr. Crisp breached the plea agreement.

> He's in a situation where it would not be a constitutionally admissible type of statement, Your Honor. (J.A. 118).

The court again sought clarification from the United States regarding the use of Mr. Crisp's statements if he breached the

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he gives the government in debriefing against him." (J.A. 117).

agreement, to which the AUSA repeated that "under this plea agreement, we would not use that information against him." (J.A. 119). The court then stated: "All right. I guess that's a matter of record, then, as thoroughly as I can get it." (J.A. 119). Judge Clarke then questioned the petitioner regarding the voluntariness of his plea and heard from the government regarding the facts of the case. Mr. Crisp's guilty plea was then accepted.

Between January 17 and his sentencing date, February 24, 1987, Mr. Crisp continually cooperated with the United States and fulfilled every aspect of his plea agreement. As a result of Crisp's cooperation, every one of Crisp's co-defendants pled guilty and agreed to cooperate with the United States. No trials were held.

Just prior to sentencing, petitioner's counsel was provided an opportunity to review the presentence report that would be provided to the sentencing judge, and later to the parole commission for determining parole guidelines. Upon reading the presentence report, defense counsel learned that statements made directly by Mr. Crisp, and derived from his statements, were included in the government's version of the offense. In particular, Crisp objected to the inclusion in the report of the statements regarding the total amount of cocaine allegedly distributed by the Burnette organization, and the amount of money Mr. Crisp was paid for the cocaine. (J.A. 158-162). Accordingly, Crisp's attorney contacted AUSA Bradenham and sought to have the objectionable sections

voluntarily omitted from the PSI. Upon the government's refusal to do so, petitioner filed a Motion to Enforce the Plea Agreement or, In The Alternative to Withdraw the Plea. (J.A. 153-154).

After a hearing held on the Motion, the District Court held that the plea agreement between the parties did not, and could not, have contemplated that information provided by Crisp would be withheld from the sentencing court and probation department, and therefore, the court denied Crisp's Motion. (App. 25a-26a, infra). Subsequently, Crisp was sentenced to 18 years of incarceration.

On appeal, the Fourth Circuit court of appeals affirmed Crisp's conviction, finding that the grant of immunity in the plea agreement did not and probably could not, immunize Crisp's debriefing

statements from being used against him at sentencing. The court of appeals held that the boiler-plate language that is normally included in plea agreements in the Eastern District of Virginia circumscribed the extent of the §6002 immunity later conferred by the non-boiler-plate agreement regarding immunity. The court of appeals reasoned that since the boiler-plate language of the plea agreement stated that the government would inform the sentencing judge and the probation department of "the nature and extent of [Crisp's] activities with respect to this case", and " all other information in its possession relevant to the sentence", it was of no legal significance that in addition the parties also had agreed to accord Crisp's statements to the United States full

protection under 18 U.S.C. §6002.

REASONS FOR GRANTING CERTIORARI

The significance of this case goes well beyond the injustice done the petitioner. Indeed, it goes to the very heart of our system of criminal justice, and as a practical matter, jeopardizes the continued viability of one of the most important tools in the government's war against drugs and organized crime, the ability to convince defendants to enter plea agreements that includes their immediate cooperation, prior to their sentencing. In the short few months since the court of appeals decision in this case was made public, both defense lawyers and prosecutors have added a new expression to our legal lexicon, called a "Crisp-dilemma." Simply stated, a "Crisp-dilemma" arises every time a defendant

agrees to cooperate with the United States, but is not willing to waive his fifth amendment right not to incriminate himself at sentencing. Prior to this case, it was believed that an agreement with the United States to treat all debriefing statements as having been made under a grant of 18 U.S.C. §6002 use immunity resolved the dilemma. Under §6002 immunity, it was believed that a defendant's incriminating debriefing statements could not be used against him at sentencing. This case raises the important issue of the appropriate manner for interpreting such agreements when a dispute arises as to the extent that the agreement confers immunity pursuant to §6002.

I.

In recent years Courts have been

repeatedly confronted with difficult questions concerning the interpretation and enforcement of plea agreements. This Court has recognized that the process of disposing of criminal charges "by agreement between the prosecutor and the accused... is an essential component of the administration of justice. Properly administrated, it is to be encouraged." Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

404 U.S. at 262, 92 S.Ct. at 498 (emphasis

added). See also Mabry v. Johnson, 467 U.S. 504, 509, 104 S.Ct. 2543, 2547, 81 I.Ed.2d 437 (1984).

The plea agreement in this case conferred use immunity to petitioner. Both the petitioner and the respondent agree that such immunity under 18 U.S.C. §6002 was part of his plea agreement with the United States. Both courts below concurred. The disagreement between the parties is the extent of the immunity conferred, whether it was limited or full use immunity.

The immunity provision itself is nowhere within the four-corners of the written agreement, and naturally, no specific qualification to said immunity is contained in the written agreement as well. Thus, this case requires clarification of the interpretive

doctrines to be utilized by courts in ascertaining the meaning of plea agreements.

A.

This Court has made it absolutely clear that the Fifth Amendment's protections must be respected at the sentencing phase of a criminal prosecution.

> There is no basis for distinguishing between the guilt and penalty phases of respondent's trial so far as the protection of the Fifth Amendment privilege is concerned... Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees... Any effort by the state to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.

Estelle v. Smith 451 U.S. 454, 456, 101

S.Ct. 1866, 1868, 68 L.Ed.2d 359 (1980).[5]

As noted in Estelle;

> [t]he essence of this basic constitutional principle is the requirement that the state which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips. (emphasis added).

451 U.S. at 462 (quoting Culombe v. Connecticut, 367 U.S. 568-582, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (1961)).

Accordingly, at the time of petitioner's guilty plea, Crisp still maintained his Fifth Amendment rights against self-incrimination pending sentencing. This fact caused a great dilemma for the parties. On the one hand,

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5 The holding of Estelle v. Smith has not been limited to sentencing hearings involving capital punishment. See United States v. Chitty, 760 F.2d 425, 432 (2d Cir. 1985).

the United States clearly wanted Crisp's cooperation and testimony against the remaining defendants in a major Continuing Criminal Enterprise, 21 U.S.C. §848, trial just a few days off. The petitioner, on the other hand, agreed to cooperate with the United States, but did not wish to waive his Fifth Amendment rights which would have resulted in the "simple, cruel expedient" of having the basis for his punishment forced "from his own lips." Fortunately, Congress had previously established a procedure through which each party to the plea agreement could accomplish their goals when it enacted 18 U.S.C. §6002, the use immunity statutes.

In Kastigar v. United States, 406 U.S. 441, 445-446, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) this Court held that:

> While a grant of immunity must afford protection commensurate

> with that afforded by the privilege, it need not be broader . . . The privilege has never been construed to mean that one who invokes it can not subsequently be prosecuted. Its sole concern is to afford protection against being forced to give testimony leading to the infliction of . . . penalties affixed to criminal acts. Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. Id. at 453. (emphasis added)

A grant of §6002 immunity must be fully co-extensive with the Fifth Amendment's protections, otherwise it will not pass constitutional muster.

Accordingly, §6002 use immunity protection was the apparent answer to the dilemma facing the parties in this case. So long as Crisp's statements were protected to the extent covered by §6002,

Crisp did not have to be concerned that the information he provided to the United States would be used to penalize him in any respect. The only remaining complication for the parties was certain boiler-plate language in the standard plea agreement used by the office of the United States Attorney that would have resulted in Crisp specifically waiving his Fifth Amendment rights under certain circumstances. Accordingly, to avoid any waiver, this provision was deleted from the agreement.[6]

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[6] This Provision reads as follows:

> Furthermore, it is agreed that in the event it is determined that your client has violated any provision of this agreement, all statements made by your client to this office or other designated law enforcement agents to this office or any testimony given by your client before a grand jury or other tribunal, whether prior to or subsequent to this agreement,

At the hurried plea hearing, in response to the court's standard inquiry, Crisp's counsel specifically informed the court that in addition to the written plea agreement, the parties had agreed that Crisp's statements would be afforded full §6002 protection. Accordingly, the defense believed that the record clearly established that the immunity grant qualified the written agreement, and

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> or any leads from such statement or testimony shall be admissible in evidence in any and all criminal proceedings hereafter brought against your client. Furthermore, your client shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence or any other federal rule that statements made by your client prior to or subsequent to this agreement, or any leads therefrom should be suppressed. It is the intent of this agreement to waive any and all rights in the foregoing respects.

avoided any impediment to Crisp cooperating with the United States.

When it became clear that Crisp's debriefings would be used in penalizing him, Crisp sought to enforce the agreement, or to withdraw from it. The courts below have refused Crisp relief, ruling that the inclusion in the plea agreement of the following boiler-plate provision acted, in effect, as a specific waiver of Crisp's Fifth Amendment privilege and limited the scope of the added §6002 immunity grant:

> this office will inform the sentencing judge and the probation department of: (1) this agreement; (2) the nature and extent of your client's activities with respect to this case; . . . (4) all other information in its possession relevant to the sentence.

The court of appeals reasoned that "if Crisp or his attorneys had contemplated

that Crisp's statements were not to be made available to the sentencing judge . . . it would have been a matter of little or no moment to include such a provision had it been intended." 817 F.2d at 259.

In reaching this result, the court of appeals adopted an extremely narrow interpretation of the plea agreement giving effect only to the written words in the agreement and ignoring the understanding of the agreement given by petitioner's counsel in open court. Such a procedure contravenes the interpretive doctrines utilized by various other courts of appeals, the Fourth Circuit itself, and the teachings of this Court in Santobello v. New York.

First, the court of appeals construed the plea agreement against the petitioner. Such a procedure was absolutely improper

especially where it was the United States who drafted the agreement. See United States v. Cook, 668 F.2d 317, 321 (7th Cir. 1982); United States v. Harvey, 791 F.2d 294 (4th Cir. 1987); United States v. Bowler, 585 F.2d 851, 854 (7th Cir. 1978).

Second, the court of appeals failed to consider that the subsequent oral agreement modified the earlier written agreement, rather than the reverse. By not applying this principle in its analysis, the court of appeals mistakenly interpreted the immunity agreement as follows:

> [The United States agrees that the defendant Gardner Crisp has informal use immunity except that the United States] will inform the sentencing judge and the probation department of..."the nature and extent of [Crisp's] activities with respect to this case..."

By giving effect to the principle, it is clear that the modified agreement was as

follows:

> "the United States will inform the sentencing judge and the probation department of...the nature and extent of [Crisp's] activities with respect to this case... [except to the extent the information was derived from the grant of immunity to Crisp].

Afterall, the immunity provision was agreed upon in addition to the boiler-plate provisions in the standard plea agreement.

Third, the court of appeals ignored the totality of the circumstances at the time the plea agreement was entered. See United States v. Harvey, 791 F.2d at 300. Wholly omitted from consideration by the court was the fact that the plea agreement was ironed-out at the last minute on a Friday preceding a Tuesday trial, at a time when the United States clearly wished to debrief Crisp immediately. It was also at a time when the trial judge was putting

immense pressure on the parties to enter the plea then or there so that his staff could attend a retirement party. At the time of the plea hearing, the final plea agreement papers were not yet out of the Government's word processor. (J.A. 112-113). The court of appeals did not give any consideration to the factual context of the plea hearing when holding it to have been "of little moment" for defense counsel to have more directly clarified the scope of the immunity.

Fourth, the court of appeals interpreted the agreement so that the immunity provision was rendered meaningless. All remaining charges against Crisp were dismissed by a different provision of the agreement. The immunity request was to protect him not from additional charges, but to protect

him from having to dig his own grave with his own lips both before the sentencing court and the parole commission. Moreover, the construction of the plea agreement adopted by the courts below would lead to the absurd result that Crisp would have fared better if he had lied to the United States or otherwise breached his agreement, rather than telling the truth and assisting the government. If he had lied, he would have been provided with full §6002 immunity protection in any subsequent prosecution and sentencing. But, because he abided by the terms of his agreement, petitioner received no protection. Courts must, at least, be required to interpret plea agreements by giving sensible meanings to its provisions.

Finally, the court of appeals decision

did not take into consideration "concerns for the honor of the government, public confidence in the fair administration of justice, and the effective adminstration of justice in a federal scheme of government," as it should have in interpreting plea agreements. See United States v. Harvey, 791 F.2d at 300. See also, Davis v. United States, 649 F.Supp. 745 (D. Ill. 1986).

CONCLUSION

Review of this case should be granted. It is the only way unsuspecting defendants and their counsel can know what they have to do to avoid having their agreements to testify against others come back to be used against them at sentencing and before the parole board. It is the only way the United States will be able to continue to secure pre-sentencing cooperation from

potential witnesses. It is also the only way this petitioner can obtain the agreement he clearly bargained for and executed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5539

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

GARDNER I. CRISP, etc.

Defendant-Appellee.

Dated: June 30, 1987

ORDER

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is

without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Phillips and Judge Haynsworth.

/s/ H.E. Widener, Jr.

For The Court

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5539

UNITED STATES OF AMERICA,

Appellant,

versus

GARDNER I. CRISP, a/k/a "Crum", a/k/a "Mr. T",

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. J. Calvitt Clarke, Jr., District Judge. (CR 85-35-NN).

Argued: October 7, 1986-Decided: May 6, 1987

Before WIDENER and PHILLIPS, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

John Flowers Mark (Michael S. Lieberman; John Kenneth Zwerling; Zwerling, Mark, Ginsberg and Lieberman, P.C., on brief), for appellant; Tommy E. Miller, Assistant U.S. Attorney (Henry E. Hudson, U.S. Attorney, on brief), for appellee.

WIDENER, Circuit Judge:

Defendant Gardner Crisp appeals from his conviction on account of the district court's denial of his motion to strike portions of his presentence investigation report or, in the alternative, to allow him to withdraw his guilty plea. We affirm.

Crisp was indicted on an indictment filed November 20, 1985, along with nine other defendants, on one count of conspiracy to distribute cocaine, 21 U.S.C. §846; eight counts of distribution of cocaine, 21 U.S.C. §841(a)(1); and one count of income tax evasion, 26 U.S.C. §7201. On January 17, 1986, Crisp entered into a plea agreement with the government in which he agreed to plead guilty to the conspiracy and income tax counts, forfeit certain property and testify truthfully

against the other co-conspirators. Crisp pleaded guilty and was found guilty on January 17th. In return, the government agreed to drop the remaining charges, and also agreed that statements made by Crisp in his debriefing would not be used against him, even if he were to breach the agreement. Crisp's sentencing hearing was held on February 24, 1986. At the hearing, Crisp objected to certain information contained in the presentence report, and filed a motion entitled "Motion to Strike Portions of the Government's Version of the Offense, or in the Alternative, to Withdraw Defendant's Guilty Plea." The basis for this motion was Crisp's assertion that the government violated the plea agreement by including in the presentence report information from Crisp's debriefing which derived from

Crisp under a grant of immunity. Specifically, Crisp objected to a statement in the report that the conspiracy brought roughly one kilogram of cocaine per week into the Tidewater area.[1] This figure was obtained from the debriefing of another conspirator, Charles Burnette, and was considered by the government to be the most accurate of the figures it possessed. Amounts stated by Crisp and a third defendant, F. Lee Wainwright, were substantially higher.[2]

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[1] Crisp also maintains that the presentence report makes direct use of his testimony in stating the amount of money Crisp made from his drug dealings. Due to our rationale in disposing of this case, it is not significant whether information in the presentence report came directly from Crisp, although we note that defendant Burnette apparently also stated the same amount of profit attributable to Crisp as did Crisp.

[2] Crisp said that the conspiracy distributed 7 to 10 kilograms each month, Wainwright that 10 kilograms were brought

The motion was denied by the district court on the ground that the grant of immunity in the plea agreement did not extend to use of Crisp's statements for sentencing in this case.

Although use of the lowest figure available would benefit Crisp, he maintains that use of Burnette's figure violated the plea agreement, which he reads as prohibiting any use of Crisp's statements against him. He argues that had he not agreed to cooperate Burnette would not have pleaded guilty[3] and the

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in every two weeks. Since Wainwright gave his statements to the government on December 5, 1985, there is no question that the government could have included Wainwright's figures in Crisp's presentence report. Even were we to agree that the bargain was violated, then, this would be the most harmless of errors.

[3] Burnette, along with five other defendant, pleaded guilty on January 21, 1986, four days after Crisp entered his guilty plea.

figures supplied by Burnette would not have been available to the government. Because we find that the grant of immunity did not reach the use of Crisp's statements for sentencing, we need not address the issue of whether use of Burnette's statements constitutes a derivative use of Crisp's testimony, which theory seems suspect in any event.

Crisp's immunity was granted in the plea agreement by the deletion of a paragraph usually included in such agreements. This paragraph reads as follows:

> Furthermore, it is agreed that in the event it is determined that your client has violated any provision of this agreement, all statements made by your client to this office or other designated law enforcement agents to this office or any testimony given by your client before a grand jury or other tribunal, whether prior to or subsequent to this agreement, or any leads from such statement

> or testimony shall be admissible in evidence in any and all criminal proceedings hereafter brought against your client. Furthermore, your client shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rule of Evidence or any other federal rule that statements made by your client prior to or subsequent to this agreement, or any leads therefrom should be suppressed. It is the intent of this agreement to waive any and all rights in the foregoing respects.

The plea agreement includes the following paragraph, which may or may not have replaced the removed paragraph above referred to:

> It is further understood that your client must at all times give complete, truthful and accurate information and testimony and must not commit any further crimes whatsoever. Should your client commit any further crimes or should it be determined that your client has deliberately given false, incomplete or misleading testimony or information, or otherwise violated any provision of this agreement, your client

> shall thereafter be subject to prosecution for any federal criminal violation of which this office has knowledge, including but not limited to perjury and obstruction of justice. Your client further agrees to submit to a polygraph examination at the request of the United States Attorney.

Of equal or more significance, the plea agreement also contains the following language:

> However, this office will inform the sentencing judge and the probation department of: (1) this agreement; (2) the nature and extent of your client's activities with respect to this case . . . (4) all other information in its possession relevant to the sentence.

Although the parties agree that the plea bargain gave Crisp the equivalent of use immunity under 18 U.S.C. §6002, this case involves interpretation of the plea agreement, not merely the construction of §6002, as defendant contends. Whatever may be the extent of §6002 immunity, its

scope, when conferred in a plea agreement, must be circumscribed by the words of the plea agreement itself. If the agreement were ambiguous, then the invocation of §6002 might be useful in determining the scope of the defendant's immunity. But a reading of the plea agreement leaves no doubt that the government would not be required to withhold relevant information from the sentencing judge. Nothing in the agreement indicates that Crisp's statements could not be used in sentencing. Moreover, the plea agreement clearly states that the government would inform the sentencing judge and the probation department of "the nature and extent of [Crisp's] activities with respect to this case", and "all other information in its possession relevant to the sentence." Certainly, the statements

of Crisp himself would be information as to the nature and extent of Crisp's activities. And none should doubt that the statements of Crisp fall within the description of "all other information in [the government's] possession relevant to the sentence." "A more comprehensive word than "all" cannot be found in the English language." Moore v. Virginia Fire and Marine Insurance Co., 28 Grat. (69 Va.) 508, 516 (1877). So the information contained in Crisp's statements, which is "information . . . relevant to the sentence," was properly given to the probation officer for inclusion in his report, whether the direct source was Crisp or someone else.

The district judge went over the plea agrement at length with Crisp and his attorneys at the January 17th plea

hearing, and ascertained that no other promises had been made to Crisp in order to secure his plea. Clearly, if Crisp or his attorneys had contemplated that Crisp's statements were not to be made available to the sentencing judge in the presentence report, this would have been the time to object. It would have been a matter of little or no moment to include such a provision had it been intended. We emphasize, however, that we imply no opinion as to the validity of any such provision which might have been included, for there is some doubt as to the validity of such an agreement, which would amount to an agreement to withhold information from the court, in view of the government's duty to furnish complete and accurate information at sentencing. See United States v. Reckmeyer, 786 F.2d 1216,

1223 (4th Cir. 1986). In light of the foregoing, Crisp's contention that his plea agreement prevents access by the sentencing judge to his later statements is without merit.

Equally meritless is Crisp's contention that the district judge erred by not recusing himself from the case after he expressed disbelief in some of the statements made by Crisp's attorneys.

Even if the record should show bias against an attorney, which is not shown here, it cannot serve to disqualify a judge unless it is of such a continuing and personal nature that it demonstrates bias against the party. See, e.g., Davis v. Board of School Commissioners of Mobile County, 517 F.2d 1044, 1050-52 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). The district judge's offhand observations

about the contentions of Crisp's attorneys do not even approach this level.

Because the reason for the motion to withdraw the guilty plea was the consideration of, and the turning over to the probation office of, the information contained in Crisp's statements, that motion was also without merit.

The judgement of conviction is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

UNITED STATES OF AMERICA,

vs. **Criminal No: 85-35-NN**

GARDNER I. CRISP, etc.

Defendant.

Dated: March 21, 1986

MEMORANDUM OPINION

This matter came before the Court on the defendant's motion to strike portions of the presentence investigation report or, in the alternative, to allow the defendant to withdraw his guilty plea. The Court has previously overruled the motion and sets forth in this memorandum its reasons for doing so.

The defendant, Gardner I. Crisp, was

indicted under a superceding indictment on ten counts of drug related offenses. On January 17, 1986, Crisp entered a plea of guilty to one count of conspiracy and one count of tax evasion. The Court accepted the defendant's plea and set a date for pronouncement of sentence.

In accordance with the plea agreement executed between the defendant and the government, Crisp was obligated to truthfully disclose any knowledge he had of narcotics violations. In return for these disclosures, the Government agreed that statements made during the course of debriefing could not be used against the defendant even in the event that the plea agreement was breached. (See Tr. of Guilty Plea, p. 6-9). The parties have stipulated that this agreement amounted to a grant of use immunity under 18 USC

§6002.

Pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, the probation department prepared a presentence investigation report to be presented to the Court before the imposition of sentence. In the event of imprisonment, this report is also reviewed by the Parole Commission in determining parole eligibility.

On February 24, 1986, defendant filed his objection to the presentence investigation report on the grounds that it contained information allegedly derived from his cooperation with the government. According to the defendant, this information is being used against him in direct violation of the Government's promise of immunity.

The portion of the presentence

investigation report to which defendant takes exception is contained within the Government's official version of the offense. Specifically, the statement is made that the conspirators brought approximately one kilogram of cocaine per week into the Newport News area. This figure, supplied by co-conspirator Charles C. Burnette, III, was one of three which the Government had been given and was considered to be the most precise. Amounts supplied by Crisp and co-conspirator F. Lee Wainwright were considerably higher than the approximation provided by Burnette.

Although the use of the lowest and most accurate figure available appears to benefit the defendant, Crisp contends it was obtained derivatively from his cooperative efforts and must be struck

from the report. According to the defendant, Burnette and five other co-conspirators would not have pled guilty had he not agreed to testify against them. Thus, without Crisp's cooperation, the government allegedly would not have had access to the information subsequently provided by the co-conspirators. Use of that information in any manner harmful to Crisp is opposed by the defendant as a violation of the plea agreement.

The issue before the Court was whether the plea agreement had in fact been violated by inclusion in the presentence investigation report of materials objectionable to defendant. In determining the scope and nature of a plea agreement, the Court must analyze and interpret its terms in accordance with standard contract law. The language of

the agreement is to be read as a whole and given a reasonable interpretation. U.S. v. Irvine, 756 F.2d 708 (9th Cir. 1985).

If the language of the plea agreement is ambiguous or contradictory, the Court must ascertain the intent and understanding of the parties from the evidence presented. See U.S. v. Arnett, 628 F.2d 1162 (9th Cir. 1979) (court to construe the meaning of government's promise to "take no position" in defendant's sentencing proceedings); U.S. v. Corsentino, 685 F.2d 48 (2nd Cir. 1982) (court to determine whether government's commitment to "take no position" at sentencing was violated by submitting a sentencing memorandum).

According to the United States Attorney, the immunity was agreed upon during negotiations and granted through

the deletion of a paragraph normally included in all plea agreements. The omitted paragraph reads as follows:

> Furthermore, it is agreed that in the event it is determined that your client has violated any provision of this agreement, all statements made by your client to this office or other designated law enforcement agents to this office or any testimony given by your client before a grand jury or other tribunal, whether prior to or subsequent to this agreement, or any leads from such statement or testimony shall be admissible in evidence in any and all criminal proceedings hereafter brought against your client. Furthermore, your client shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence or any other federal rule that statements made by your client prior to or subsequent to this agreement, or any leads therefrom should be suppressed. It is the intent of this agreement to waive any and all rights in the foregoing respects.

Additionally, the immunity was discussed before the Court on the date the

guilty plea was entered. The Court carefully questioned the parties on the exact nature of the agreement and determined the essential issue to be whether the defendant's statements could be used against him in the event prosecution became necessary. (See Tr. of Guilty Plea, p. 8-9).

The Court notes that both the excluded paragraph and the discussion before the Court reflect that the parties were concerned solely with the use or non-use of information in the event the defendant was ever prosecuted. At no point during the plea of guilty did the defendant or his counsel argue that the information could not be considered during sentencing or in the determination of parole eligibility. The parties were afforded ample opportunity to voice any such

understanding had it existed at the time the contract was formed. Indeed, the defendant was specifically asked by the Court whether he had been offered any inducements to plead guilty other than those conditions set forth in the written plea agreement. Defendant respondent negatively. (See Tr. Plea of Guilty, p. 23).

Turning next to examine the written agreement, the Court finds that the Government clearly reserved the right to inform the sentencing judge and the probation office of the nature and extent of defendant's illegal activities. (See Plea Agreement, p.2). In light of this clause, defendant is distinctly at odds with logic in arguing that accurate and relevant materials should be withheld from the presentence investigation report.

Clearly, according to standard practice, the probation department intended to include the Government's information in its report for the benefit of the Court and prison officials. See U.S. v. Avery, 621 F.2d 214 (5th Cir. 1980) (Government's promise to "stand mute" at sentencing not breached by inclusion of information in presentence report where probation office routinely interviewed prosecutors).

Moreover, it is inconceivable that the defendant would expect either the United States Attorney or the probation department to provide the Court with figures known to be less than accurate. Nor is it logical to provide the Court with one set of figures to use in setting a sentence and the Parole Commission with another set of figures to use in administering the sentence simply because

the Parole Commission was not specifically mentioned in the plea agreement.

Accordingly, the Court found that the Government's promise of immunity did not include a promise to exclude defendant's admissions, or information derived therefrom, from the presentence investigation report. Any understanding to the contrary was not reasonable under the circumstances. Furthermore, even if such a promise had been made, defendant presented no evidence that he relied on it to his detriment. Neither the defendant nor his attorney testified under oath that they had relied on any figures or any presumptive parole date in their negotiations with the Government. However, the United States Attorney testified that prior to the plea agreement, he had clearly informed counsel

for the defendant that the most accurate figures available would be given to the Court. It is noteworthy that the defendant's attorney was given an opportunity to secure substitute counsel for the defendant so that he could testify and a special date was set for the very purpose of hearing both counsel testify so that the Court could determine the intent of counsel and the defendant.

Therefore, the motion to strike portions of the presentence report was DENIED. The Court will now set forth its position on the motion to withdraw the guilty plea.

Plea withdrawal is governed by Rule 32(d) of the Federal Rules of Criminal Procedure. If made before sentencing, the Court may permit withdrawal upon a showing by the defendant of any "fair and just"

reason. Under this standard, courts normally allow withdrawal unless the Government will be unduly prejudiced. U.S. v. Strauss, 563 F.2d 127 (4th Cir. 1977).

The Court is of the opinion that to allow a withdrawal of the plea would be tantamount to a dismissal of the case. By virtue of his derivative use argument, defendant would attempt to exclude all testimony of those co-conspirators who pled guilty subsequent to his plea. The Government would suffer great prejudice in having to establish either that the disputed testimony is not tainted or that evidence has been derived from legitimate sources independent of Crisp's admissions. See Kastigar v. U.S., 406 U.S. 441 (1972); U.S. v. Aument, Civil No. 84-5113, (4th Cir. April 18, 1985).

In view of the prejudice which the government would have sustained and the Court's previous finding that the defendant did not rely on any calculations of parole eligibility in pleading guilty, we denied the motion to withdraw the guilty plea.

The Clerk is DIRECTED to send a copy of this Memorandum to counsel for the defendant and to the United States Attorney.

/s/ J. Calvitt Clarke

United States District Judge

Norfolk, Virginia

March 19, 1986